IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

APPEAL FROM ORDER NO.989 OF 1997

Gokhale Enterprises
A Proprietory concern through
its proprietor Shri Prabhakar
S. Gokhale, Adult, Occ:Business
residing at 1375, Shukrawar Peth
Bajirao Road, Pune-411 002 ... Appellant

V/s.

1. Purshottam Enterprises
a proprietory concern (Unit of
S.G. Gokhale & Co.) through its
Proprietor Shri Amit Gokhale
Adult, Occ: Business, residing
at 1358-A, Shukrawar Peth,
Natu Baug, Pune - 411 002

2. M/s.Nippon Denro Ispat Limited,
having its office at 219
Vardhaman Chambers, Sector 17
Vashi, New Bombay - 400 703
and at Cassablanca, 3rd floor
Sector 11, Plot No.45, CBD
Belapur, New Bombay - 400 614 ... Respondents

Mr.P.S. Dani for Appellant
Mr.Cyrus Bharucha for Respondent No.2

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **NOVEMBER 29, 2004**

ORAL JUDGMENT:

. The present Appeal from Order has been filed against the order of the trial Court returning the plaint to the appellant to be filed in the proper Court. This order has been passed on an application filed at Exhibit 24 by Defendant No.2 that is Respondent No.2

herein to the effect that the preliminary issue of jurisdiction should be decided first under section 9A of the Code of Civil Procedure.

2. In 1997, the appellant herein, that is the plaintiff, filed a suit for recovery of Rs.75,35,924/- from Defendant No.1 alongwith damages. It appears that Defendant Nos.1 and 2 entered into an agreement for erecting a monsoon shed for defendant No.1 who in turn awarded the contract to the plaintiff. As the monies were not paid by defendant No.1 to the plaintiff, the plaintiff filed a suit before the Civil Judge Senior Division, Pune claiming certain amounts including damages. A prayer was also made for an injunction against the defendants from utilising the material which was used including the funds for erection of a new monsoon shed at the worksite. In para 17 of the plaint, the plaintiff has asserted that defendant Nos.1 and 2 were within the jurisdiction of the Court at Pune. The plaintiff has also sought leave under section 20(b) for joining Defendant No.2 as party to the suit, obviously because defendant No.2 did not conduct business within the jurisdiction of the Court in Pune.

3. Besides making this averment in the plaint, an application was also filed by the plaintiff for leave under section 20(b) to sue the defendant No.2 in the

Court in Pune. On 18.6.1997, an application was filed under section 9A of the Code of Civil Procedure by Defendant No.2 at Exhibit 44. Defendant No.2 contended that since the cause of action did not arise within the jurisdiction of the Court at Pune and the registered office was at Belapur, New Bombay, no action could be taken against Defendant No.2 in the Court at Pune. It was also contended that the monsoon shed was erected in Raigad District and that the Court at Pune had no jurisdiction. In reply to this application the plaintiff stated that the defendants were in breach of the statutory terms and obligations which the plaintiff came to know of in Pune and therefore, a part of cause of action has arisen in Pune. The plaintiff has also stated in its reply that application under section 20(b) of Civil Procedure Code has already been made to sue Defendant No.1 in the Court at Pune.

4. The trial Court while considering the application filed by Defendant No.2 at exhibit 44 has held that it has no jurisdiction to decide the suit and that the plaint should be returned to the plaintiff to be presented in the proper Court.

5. The learned Advocate for the plaintiff submits that the application filed under section 20(b) of the Civil Procedure Code has not been considered by the

Court. He submits that this issue ought to have been considered together with the application filed by Defendant No.2 regarding the jurisdiction of the Court. According to him, the suit in any event, would be maintainable against Defendant No.1 in Pune. He submits that in the circumstances set out in the plaint, the suit was maintainable against Defendant No.2 as well. The learned Advocate also submits that while returning the plaint to present the same in the proper Court, the trial Court has not considered the application filed by the plaintiff under section 20(b) of the Code of Civil Procedure.

6. Mr.Bharucha appearing for the defendant No.2 submits that there was no privity of contract between the plaintiff and Defendant No.2. Therefore, the suit was not maintainable against Defendant No.2. He submits that Defendant No.2 is being dragged into this litigation unnecessarily when there was no contract between the plaintiff and Defendant Nos.2 for construction of the monsoon shed. He urges that Defendant No.2 had no establishment in Pune since the regional office is in Belapur and its registered office is in Kolkata. The work of erection of the monsoon shed was completed in the Raigad district. Therefore, according to him, the suit could have been filed against Defendant No.2 in Raigad district, if at all and not in

Pune. The learned Counsel further relies on the judgment of the *Raizada Topandas & Anr. v/s. Gorakhram Gokalchand*, **(1964) 3 SCR 214** in support of his contention that when a suit is not maintainable in a particular Court because of its lack of territorial or pecuniary jurisdiction, the plaint has to be returned for presentation to the proper Court. It is only if the nature of the suit is one which is not cognisable by the class of Courts to which the Court belongs, the plaintiff's suit will have to be dismissed in its entirety. According to the learned Counsel, the trial Court has not erred by returning the plaint for the plaintiff to present it before the appropriate Court.

7. Having given my anxious consideration to the submissions made before me, I find that the order impugned has been passed under exhibit 44. There is no dispute that Exhibit 44 is application preferred by Defendant No.2 under section 9A of C.P.C. raising an objection to the territorial jurisdiction of the Court as a preliminary issue. There is no dispute that Defendant No.2 had its registered office at Kolkata and did not have any establishment in Pune where the suit was filed. It was for this reason that the plaintiff had preferred an application under section 20(b) for leave to sue Defendant No.2. Unless this application was heard and decided, the plaintiff could not have

filed an application for interim relief against Defendant No.2. No orders could have been passed against Defendant No.2 unless leave was obtained. Section 9A empowers the Court to decide an objection raised by a party pertaining to the Court's jurisdiction to entertain the suit, when an application for interim relief is preferred by the Plaintiff. It is only if leave to sue the Defendant who does not reside, or carry on business or work within the jurisdiction of the Court, has been granted, will the question arise as to what interim relief should be directed against that Defendant. Therefore, in my view unless the first step of granting leave to sue has been taken by the Court the subsequent applications cannot be considered.

8. It is difficult to accept the submission that the plaint was required to be returned by the trial Court without considering the application made by the plaintiff under section 20(b) of the C.P.C. In my view, unless the Court had considered this application, it was not proper for it to decide the application under section 9A of C.P.C. When the plaintiff makes an application for leave to sue the defendant in a particular Court the Court must decide this application first. At best, the trial Court could have considered both the applications filed together, that is the application under section 20(b) as well as the

application under section 9A. Not having done so, the trial Court's order requires to be set aside.

9. The learned Counsel for Defendant No.2 urges that although the Court has not specifically mentioned the application under section 20(b), it has in fact considered the same and held that there is absolutely no evidence on record to show that there was privity of contract between Defendant No.2 and the plaintiff and that, therefore, it had no jurisdiction to entertain the suit. This submission cannot be accepted. There was nothing on record to show that the parties were put to notice that both the applications were being considered together by the trial Court.

10. In *Raizada's* case (supra) the Supreme Court quoted with approval the observations made by the Full Bench of the Allahabad High Court in the case of *Ananti v/s. Channu,* **1930 ILR Vol.LII (Allahabad Series) 501** regarding the general principles which govern the question of jurisdiction at the inception of a suit. However, in the present case before deciding the issue as to whether leave ought to have been granted to plaintiff to sue Defendant No.2, the Court ought not to have considered the question of jurisdiction under section 9A of the Civil Procedure Code. That apart, when Defendant No.1 admittedly carries on business in

Pune, the plaint could not have been returned.

11. The impugned order is therefore, set aside. The trial Court shall consider the application under section 20(b) of the Civil Procedure Code and the application under section 9A of the Code, afresh, within a period of three months from today. Needless to say that the trial Court shall consider the applications uninfluenced by the impugned order.

12. Appeal from Order is allowed accordingly.